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In The

Supreme Court of the United States

October Term, 1962

No. 291

HELEN ELIZABETH PULLEY,

Appellee,

v.

CHARLIE HERBERT PULLEY,

Appellant.

ON APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA.

MOTION TO DISMISS OR AFFIRM

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Appellee, Helen Elizabeth Pulley, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment of the Supreme Court of North Carolina be affirmed on the ground that no substantial Federal question is presented, that the Federal question sought to be reviewed was not timely raised or expressly passed on, or in the alternative, that this appeal be dismissed.

STATE CONSTITUTION PROVISIONS AND STATUTES INVOLVED

The relevant state constitutional and statutory provisions

are set forth on Pages 2, 3, 9 and 10 of the appellant's jurisdictional statement. They are here repeated for the convenience of the Court.

Article 1, Section 16 of the *Constitution of North Carolina*, provides:

> "There shall be no imprisonment for debt in this State, except in cases of fraud."

Article 1, Section 17 of the *Constitution of North Carolina*, provides:

> "No person ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land."

The statute of the State of North Carolina here involved is *North Carolina General Statutes* 1-247, which reads as follows:

> "A judgment by confession may be entered without action either in or out of term, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this article.
>
> "A judgment by confession may be entered for alimony or for support of minor children, and when the same shall have been entered as provided by this article, such judgment shall be binding upon the defendant, and the failure of the defendant to make any payments, as required by such judgment, shall, upon proper cause shown to the court, subject him to such penalties as may be adjudged by the court as in any other case of contempt of its orders, subject to authority of the court to modify said judgment thereafter for proper cause shown as provided by law in case of adverse judgment in proceedings for such alimony or support."

STATEMENT OF CASE

On the 11th day of July, 1958, the defendant signed a Con-

fession of Judgment before the Clerk of the Superior Court of Onslow County, North Carolina, wherein he stated: (Rp. 2) "This confession is for an obligation for maintenance and support justly due by the defendant to the plaintiff and which obligation arose in the following manner, to wit:" Here the appellant recited his marriage to appellee in 1933 and living together as husband and wife until the date of the Confession of Judgment when as a result of, in the appellant's words, "many differences, irreconcilable controversies and incompatibilities" which had "existed for an appreciable length of time" and continued to exist they could not live together "happily and peaceably as man and wife and believing that it is necessary to the health and happiness of both of the said parties that they should separate and live apart from each other forever hereafter." The appellant also stated in his Confession of Judgment that he did "hereby confess judgment and authorize entry thereof, subject to further order of court as in such cases by law made and provided, in favor of Helen Elizabeth Pulley of Onslow County, North Carolina, the plaintiff herein (appellee before this Court) in the form of *alimony* in the sum of Sixty-Two Dollars and Fifty Cents ($62.50) on the 3rd and 18th of each and every month hereafter from the 3rd day of July, 1958, *for her maintenance and support.*" (Emphasis Added.) The defendant-appellant further stated in the Confession of Judgment (Rp. 2) "The defendant herein has chosen this means of so doing." The said Clerk entered a judgment on the same date pursuant to such confession. Thereafter, pursuant to such Judgment, the defendant paid to the plaintiff the sum of Sixty-Two Dollars and Fifty Cents ($62.50) twice each month to and including the payment which was due on December 3, 1960, but since said date has made no payment whatever to the appellee. On January 6, 1961, the plaintiff filed a motion praying the Court that the defendant be ordered to show cause why he should not be attached for contempt for his failure to make the payments required by the Confession of Judgment and Judgment (Rpp. 5 and 6). The defendant filed his Answer to Motion (Rpp. 6 and 7) setting up several defenses including defects in his Confession of

Judgment and Judgment but making no reference whatsoever to the violation of any of his constitutional rights. The matter came on for hearing before the Superior Court of Onslow County and on March 27th, 1961, the Court denied plaintiff's Motion and dismissed the same (Rp. 35). The plaintiff appealed to the Supreme Court of North Carolina and the ruling of the Superior Court of Onslow County was reversed and the lower Court directed to issue a Show Cause Order as prayed in plaintiff's Motion. This case is reported as *Pulley* v. *Pulley*, 255 N.C. 423, which opinion was filed on 11 October, 1961.

The Show Cause Order was issued, pursuant to the North Carolina Supreme Court opinion, by the Superior Court of Onslow County, and made returnable on January 15, 1962, and was served on the defendant on 8 January, 1962 (Rp. 37) together with a copy of the first Motion to Show Cause which was dated January 6, 1961. Thereafter, the appellant filed an Answer to Motion and Show Cause Order wherein he alleged the violation of Article 1, Section 16, of the *Constitution of North Carolina*, of Article 1, Section 17, of the *Constitution of North Carolina*, of the 13th Amendment to the *Constitution of the United States* and of the 14th Amendment to the *Constitution of the United States*.

The hearing on the Show Cause Order issued under date of 8 January, 1962, was held at the January Term, 1962, of the Superior Court of Onslow County and the presiding judge entered an Order holding the defendant in contempt and ordering the defendant confined to the common jail of Onslow County for thirty (30) days and provided that the defendant could purge himself of his contempt upon the payment of Sixteen Hundred Twenty-Five Dollars ($1625.00) into the Office of the Clerk of Superior Court of Onslow County, to be paid by the Clerk to the plaintiff (Rpp. 65-67). The defendant appealed to the Supreme Court of North Carolina and in an opinion filed on the 28th day of March, 1962, in the case of *Pulley* v. *Pulley* and reported in 256 N.C. 600, the Supreme Court of North Carolina affirmed the Superior

Court of Onslow County. From such opinion and judgment on May 30th, 1962, the defendant filed his Notice of Appeal to the Supreme Court of the United States.

ARGUMENT

(A)

The case here presented does not present a substantial Federal question. Appellant has advanced only one reason that such a question is presented and that is that North Carolina General Statutes 1-247 under which the Confession of Judgment and Judgment herein were entered provides for imprisonment for debt and is thus unconstitutional. Clearly, the Confession of Judgment and Judgment are for the payment by the appellant-husband to the appellee-wife of the sum of Sixty-Two Dollars and Fifty Cents ($62.50) twice each month as alimony.

In *Penfield Company of Cal.* v. *Securities and Exchange Commission*, 330 U. S. 585 (1947) reh. denied 331 U. S. 865 (1947), this Court held that contempt has the dual function of vindication of public interest by punishment of contemptuous conduct and of coercion to compel the contemnor to do what the law requires of him.

In *Goggans* v. *Osburn*, 237 F. 2d 186, 9th Cir. (1956) the Court stated the following:

". . . For the wilful refusal of the husband to pay alimony, contempt proceedings will lie.

"These consequences flow from a decree for the payment of alimony because the duty to pay alimony, as well as support money for children, is public in nature. The community as a whole is vitally concerned that families shall not be left destitute by irresponsible husbands or fathers. The extent of this public interest is revealed in the fact that enforcement of a decree requiring the payment of alimony or support money has been held to be outside constitutional prohibitions against imprisonment for debt."

"Alimony may be enforced by process for contempt, and the contumacious husband imprisoned for his wilful refusal to pay after being ordered by the Court to do so. This imprisonment will not amount to imprisonment for debt within the meaning of constitutional provisions prohibiting such imprisonment; since alimony in the view of many of the courts is not a debt founded upon contract, but is more in the nature of a penalty, imposed upon the husband for his wrongful act and noncompliance with the order of Court." *Marriage and Divorce*, 3rd Ed., pp. 738 and 739.

Numerous cases may be cited to the effect that alimony is not a debt within the meaning of constitutional prohibitions against imprisonment for debt including:

McFerran v. *McFerran*, 348 P. 2d 222, 55 Wash. 2d 471;
Ryan v. *Ryan*, 123 So. 2d 102, 271 Ala. 243;
Clausen v. *Clausen*, 84 N.W. 2d 675, 250 Minn. 293;
Bradley v. *Superior Court In and For City and County of San Francisco*, Cal., 310 P. 2d 634;
Gibson v. *Stiles*, Ky., 240 S.W. 2d 609;
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Krueger v. *Stone*, 188 So. 575, 137 Fla. 498;
Winkel v. *Winkel*, 15 A. 2d 914, 178 Md. 489; and
Speer v. *Speer*, Ohio Com. Pl., 74 N.E. 2d 97.

This Court in *Williams* v. *State of N. C.*, 325 U.S. 226 (1945) reh. denied 325 U.S. 895 (1945) clearly held that both divorce and marriage concern not only the parties to the marriage but also society in general.

In *Audubon* v. *Shufeldt*, 181 U.S. 575, 578 (1901) this court distinguished alimony from debt and said:

> "Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt; alimony from time to time may be regarded as a portion of his current income or earnings; ***"

In *Westmore* v. *Markoe*, 196 U.S. 68, 77 (1904) this court distinguished alimony and debt by stating:

> "While it is true in this case the obligation has become fixed by an unalterable decree so far as the amount to be contributed by the husband for the support is concerned, looking beneath the judgment for the foundation upon which it rests, we find it was not decreed for any debt of the bankrupt, but was only a means designed by the law for carrying into effect, and making available to the wife and children, the right which the law gives them as against the husband and father."

In *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 193, 194, (1949) the following is set forth:

> "We are dealing here with the power of a court to grant the relief that is necessary to effect compliance with its decree. The measure of the Court's power in civil contempt proceedings is determined by the requirements of full remedial relief. They may entail the doing of a variety of acts, such as the production of books. (Citation). They may also require the payment of money as in the alimony cases. See Grompers v. Buck's, S & R Co., 221 U.S. 418, 442, 31 S.Ct. 492, 498, 55 L.Ed. 797, 34 L.R.A., N.S., 874; Oriel v. Russell, 278 U.S. 358, 364-365, 49 S.Ct. 173, 174, 175, 73 L. Ed. 419."

Certainly one may not be imprisoned for debt but here we are not dealing with a debt, but with alimony and with the refusal of the defendant to obey an order of court which he freely entered into.

(B)

Appellant made no contention that any of his constitutional rights had been violated until slightly in excess of one year after the motion as to contempt was filed herein by the appellee and served upon him and not until after this case had been appealed to the Supreme Court of North Carolina and had his contentions rejected. He did not raise constitutional questions at his first opportunity. In *State* v. *Jones*, 242 N.C. 563 (1955) as to North Carolina practice the court said:

> "Therefore, in conformity with the well established rule

of appellate courts, we will not pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the court below."

It is clear that the appellant after having his contentions adversely determined by the Supreme Court of North Carolina in its 1961 opinion, went fishing for any straw that he could find upon which to hang his hat.

CONCLUSION

This appeal presents no substantial Federal question. The Supreme Court of North Carolina has twice determined this action adversely to the appellant and the appeal should be dismissed or the judgment affirmed.

Dated: Jacksonville, North Carolina, August 20, 1962.

Respectfully submitted,

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